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No. 87-1668

IN THE

Supreme Court Of The United States

October Term, 1987

RICHARD ARRINGTON, JR., et al.,
Petitioners

v.

ROBERT K. WILKS, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Can persons affected by court-approved consent decrees containing race conscious relief challenge those decrees in a collateral proceeding when they had notice and the opportunity to be heard before the entry of those decrees?

2. If collateral attacks on consent decrees are permissible, what is the scope of the nonparty's right collaterally to challenge the decree?

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ARGUMENT IN REPLY

The arguments raised in the Briefs in Opposition to Certiorari of Respondents Wilks *et al.* ("Wilks")[1] and Amicus are unpersuasive. Indeed, the factual and legal gymnastics in which Wilks was required to engage in opposition compel the conclusion that there exists no principled basis on which to oppose certiorari, and the writ is due to be granted. As the Solicitor General notes in joining the Petitioners in support of review of the collateral attack issue: "The petitions present this Court with an occasion to resolve the conflict among the courts of appeals and provide valuable guidance to litigants in this important area of federal law." Brief for the United States at 10.[2]

[1]The Brief In Opposition to Certiorari to the United States Court of Appeals for the Eleventh Circuit of Respondents Robert K. Wilks, *et al.* will be referred to as "Wilks' Brief in Opposition."

[2]Of course, the City disagrees with the government's position that the Eleventh Circuit was correct in holding collateral attacks to be permissible, and does not concede that Wilks was denied his "own day in court." Brief for the United States at 8, 9. However, the City will respond to such contentions in its brief on the merits.

Respondents City of Birmingham and Richard Arrington, Jr. (collectively the "City") offer this Reply in order to correct the misimpressions that Wilks and Amicus attempt to foist on the Court.

I. This Case Squarely Presents The Collateral Attack Issue Left Unresolved By *Marino*

Wilks accurately notes that the course of proceedings and nature of the claims in *Marino v. Ortiz*, ... U.S. ....., 108 S. Ct. 586 (Jan. 13, 1988), differ from those underlying these reverse discrimination cases. Based on those differences, Wilks urges the Court erroneously to conclude that the issue concerning the propriety *vel non* of collateral attacks is not here presented. Contrary to Wilks' assertion, the "collateral attack issue" — "whether a District Court may [or should] dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation," *Marino*, ... U.S. at ....., slip op at 2 — is squarely raised in these proceedings,[3] as the Solicitor General has noted. Brief for the United States at 8.

The only material difference between *Marino* and the instant controversy is that in *Marino*, there was issue as to whether plaintiffs' cause of action constituted a collateral attack. *See, Marino* Petition for Writ of Certiorari, Issue B and pp. 18-21.[4] However, despite the absence of a frontal attack on the consent decree in *Marino*, the Second Circuit concluded that the suit constituted a collateral attack, and upheld the trial court's dismissal on that basis. *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986). Hence, the collateral attack issue was directly presented in, but was not resolved by, *Marino*. Here, Wilks' claims clearly challenge the lawfulness of the remedies obtained in the City

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[3]Wilks' suggestion that the City's *conduct*, rather than the *Consent Decree*, is at issue is disingenuous. There has never been any question but that the City's employment decisions at issue here were made pursuant to the City's Decree.

[4]Plaintiffs in *Marino* were seeking to have the proposed consent decree extended to apply to them, not to vitiate the remedies awarded blacks.

and Board Decrees by the original black plaintiffs and the United States. The collateral attack issue left unresolved by *Marino* is squarely presented by the City's Petition.

II. *Local 93 v. City of Cleveland* Does Not Address Or Resolve The Collateral Attack Issue

In *Local No. 93 v. City of Cleveland,* 478 U.S. 501 (1986), the Court examined whether 706(g) of Title VII of the Civil Rights Act of 1964, as amended, limits the relief available to discrimination claimants in a consent decree. A majority answered that question in the negative, based on the legislative history of Title VII, after noting that the "Court's cases do not treat consent decrees as judicial decrees in all respects and for all purposes." 478 U.S. at ____, 92 L.Ed.2d at 421. The Court concluded that in the context of redress for past discrimination, the voluntary aspects of a consent decree predominated, and controlled the result of that case. From that holding, Wilks embraces the conclusion that a consent decree is completely voluntary, and seeks to extrapolate that conclusion to an utterly different context: because a consent decree is voluntary, Wilks urges, it has none of the force of a judgment, and hence may be freely attacked by nonparties to the decree. In making his quantum leap, Wilks ignores the Court's lesson that "consent decrees 'have attributes both of contracts and of judicial decrees,' a dual character that has resulted in different treatment for different purposes."[5] 478 U.S. at ____, 92 L. Ed. 2d at 405 (Quoting *United States v. Continental Baking Co.,* 420 U.S. 223, 235-237 and n. 10 (1975)). Equally importantly, Wilks overlooks that the Court's grant of certiorari in *Marino* — and the fact that the Court was equally divided on the issue —

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[5]For the present, it suffices to note that a consent decree is entered only after notice and an opportunity for all interested persons, party and nonparty alike, to present objections, either written or oral. A consent decree, in contrast to a voluntary employer-adopted affirmative action plan, is entered only after the trial court has considered objections, and approved the decree. As will be addressed more fully in the City's brief on the merits, that attribute of a judgment forecloses Wilks' argument.

necessarily compels the conclusion that this Court does not view *Local 93* as dispositive.

Wilks also erroneously urges that the courts of appeals ("with the exception of the unique facts of *Marino v. Ortiz,* 806 F.2d 1144 (2d Cir. 1986") have consistently followed *Local 93* to authorize collateral attacks and hence, any conflict which existed has been resolved. Wilks' position is incorrect:

1. In *Marino,* however its underlying facts are characterized, the Second Circuit unequivocally held that plaintiffs' suit was a collateral attack, and as such was due to be dismissed.[6]

2. None of the circuits that have adopted the "no collateral attack" rule (see Petition of the City at 6) have reversed themselves on the issue in light of *Local 93.*[7]

3. At least one circuit court has noted within the past month that the issue remains undecided. In *Zipes v. Trans World Airlines,* ..... F.2d ....., Case No. 86-2731 (May 6, 1988), the Seventh Circuit — which previously had rejected the no collateral attack rule, *Dunn v. Casey,* 808 F.2d 555 (7th Cir. 1987) — stated that the permissibility of a collateral attack on a consent decree remains "unclear," in light of the decision of the equally divided *Marino* Court. ..... F.2d at ....., n.9.

III. Assuming Collateral Attacks Are Permissible, Wilks Was Accorded His Day In Court In The District Court Proceedings

Wilks does not respond directly to the second issue submitted for writ of certiorari by the City: if collateral attacks on consent decrees are permissible, what is the scope of the non-party's right collaterally to challenge the decree? However, Wilks

[6]Though the Solicitor General fallaciously suggests that some circuits foreclosing collateral attacks may reconsider those rulings in light of *Local 93,* see Brief for the United States at 8-9, n.8, the United States admits that the decision of the Second Circuit in *Marino* is squarely in conflict with the decision below. *Id.*

[7]Nor can they be expected to, because *Local 93* does not address the issue. See p. 3, above.

makes several misrepresentations in his statement of facts which bear on the issue. Wilks alleges essentially that the trial court *sua sponte* ("without a trial, summary judgment motion, or other hearing" (Wilks' Brief in Opposition at 5)) decided all issues other than "consent decree compliance" and limited evidence to that issue. The government contends that consideration of the second issue is premature, also suggesting that plaintiffs were not allowed to make their case in district court. As the record documents. Wilks' allegations and the government's contentions are nonsense.

Wilks is correct that the district court issued several pretrial Orders in which it made rulings on various issues, or evinced its expectation that it would rule in a given manner with respect to those issues. However, each of those Orders was in response to a motion by one or more of the parties, and each was issued only after extensive briefing and argument by all parties. Also misleading is Wilks' assertion that the trial court limited the admissible evidence to decree compliance. No evidence bearing on the decree's validity was offered or proffered at trial by Wilks or the United States. That the trial court would have accepted such evidence, if offered, is demonstrated by the court's admission into evidence of voluminous documents, regarding the 1976 and 1979 trials in the proceedings resulting in the Consent Decree, offered by the City in support of the validity of the Consent Decree.[8] The only significant evidence of any kind offered by plaintiffs but excluded by the court pertained to certain black promotees and was rejected on the basis that the information was unknown to the City at the time the promotions were made. As Wilks acknowledges: "This case contains a complete record of the proceedings which resulted in

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[8]Also without foundation is Wilks' claim that the trial court's finding that the decree was lawful was "without explanation." (Wilks' Brief in Opposition at 6). The trial court reaffirmed its analysis approving the Decree in 1981 (United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981)), App. at 61a, an analysis consistent with the Court's subsequent rulings in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency*, 480 U.S. _____, 94 L.Ed.2d 615 (1987).

the consent decree, the conduct of the defendants in implementing their plan, and the relative qualifications of competing black and white candidates." (Wilks' Brief in Opposition at 21). The trial court clearly accorded Wilks a "day in court" on all issues raised by Wilks.[9] The record supplies ample basis to support a ruling from the Court that, to the extent collateral attacks are permissible, the district court provided Wilks a full opportunity to present his case in the district court proceedings.

CONCLUSION

In its Petition for Writ of Certiorari the City demonstrated that the issues presented warranted the grant of a writ of certiorari. Wilks' (and Amicus') opposition is unpersuasive, as demonstrated above. The City's Petition is due to be granted.

Respectfully submitted,

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[9]Tellingly, both Wilks and the government acknowledged that fact to the Court of Appeals. In response to direct questions from Judge Tjoflat during oral argument, counsel for Wilks and counsel for the government expressly *denied* that the trial court had deprived them of an opportunity to present their claims of reverse discrimination.